SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 64.

O. C. TOMKINS, Petitioner,

vs.

THE STATE OF MISSOURI, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

REPLY BRIEF FOR PETITIONER.

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TABLE OF AUTHORITIES.

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I.

Respondent urges that petitioner did not exhaust his remedies in the State courts because he did not ask leave to amend his petition for writ of habeas corpus in the Supreme Court of Missouri. It is argued that the judgment is therefore not a final judgment from which certiorari will lie.

The contention is analogous to that made in **Betts v. Brady,** 316 U. S. 455 (1942), that the denial of a writ of habeas corpus by the Maryland court there was not a final judgment, and the petitioner had not exhausted his Maryland remedies, because he might apply for habeas corpus successively to one judge after another and to one court after another without exhausting his right. This Court held there that this circumstance did not "deny to the judgment in a given case the quality of finality requisite to this Court's jurisdiction."

The Court has held also that the decision of the Supreme Court of a State, denying an application for a writ of prohibition, is a final judgment within the meaning of Section 237 of the Judicial Code. **Michigan Central Railroad Co. v. Mix,** 278 U. S. 492 (1929). This is so even if the determination is made on a demurrer to the petition. **Bandini Petroleum Co. v. Superior Court,** 284 U. S. 8 (1931). Of course there the petition might have been amended after the demurrer was sustained.

Under the circumstances here it would, of course, have been impossible for the petitioner to amend his petition for writ of habeas corpus, without counsel, and without knowledge of the reasons why the Supreme Court of Missouri considered it defective. If the petition, when given the construction most favorable to petitioner, and with every fair inference and reasonable intendment read into it, stated a cause of action, petitioner had a right to stand upon it. If it did not state a cause of action based upon the Fourteenth Amendment this Court is bound to quash its writ of certiorari. The result of giving effect to this contention of respondent would be the same as that suggested in **Betts v. Brady** (at 461): it "would be to deny all recourse to this court in such cases."

II.

In connection with respondent's second point, it is said that petitioner did not challenge the constitutionality of the Missouri statute respecting the appointment of counsel (Section 1003, R. S. Mo. 1939) in his petition for habeas corpus, and that therefore this Court on certiorari cannot consider the constitutionality or unconstitutionality of that statute.

This indicates a misconception of petitioner's argument. We do not contend that the statute was unconstitutional; we have argued that it was not complied with by the trial court, although petitioner's case is not rested on that point alone. The statute in terms not only reinforces but goes beyond the narrow holding of **Powell v. Alabama,** 287 U. S. 45 (1932), as to the requirement of the due process clause.

III.

Respondent's final contention is that, since petitioner pleaded guilty in the trial court and failed to take an appeal, on which he might have raised the issue of denial of counsel, his right to raise the question now has been foreclosed.

It is true that petitioner—if he had had counsel—might have taken an appeal and on that appeal asserted deprivation of the right to counsel. Indeed, if he had had counsel, it is to be inferred that he would never have pleaded guilty.

But the petitioner was ignorant even of the right to counsel. It follows that even if he had known that he had a right to appeal he would have been incapable of asserting denial of counsel as the basis of an appeal. The argument simply emphasizes once more the petitioner's need for counsel. It is equivalent to an assertion that if

a constitutional right is denied to one ignorant of its existence and unable to claim its protection, he can never thereafter obtain relief from the continuing effects of the original deprivation. Under circumstances not unlike those in this case, this Court has held that that is not the law. **Smith v. O'Grady,** 312 U. S. 329 (1941); see, also, **Walker v. Johnston,** 312 U. S. 275 (1941).

Respectfully submitted,

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